FISCHER IMAGING CORPORATION

CONTRACT NO. V797P-6712A **VABCA-6125-6127**
DELIVERY ORDER No. 797160838

VA MEDICAL CENTER
RICHMOND, VIRGINIA

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OPINION BY ADMINISTRATIVE JUDGE KREMPASKY

These appeals, timely filed by Appellant, Fischer Imaging Corporation, (FIC), stem from the Respondent's, Department of Veterans Affairs (VA or Government) termination for cause of Delivery Order (DO) No. 797160838 under Contract No. V797P-6712A (Contract) and the VA's final decisions asserting claims for repayment of amounts it paid FIC for a radiographic electrophysiology system delivered to the VA Medical Center at Richmond, Virginia (VAMC Richmond) and for the additional costs of acquiring a

replacement electrophysiology instrument from another vendor. The appeal in VABCA-6125 is from the Contracting Officer's (CO) final decision terminating the DO for cause. The appeal in VABCA-6126 is from the final decision demanding return of the $301,086 paid to FIC and the appeal in VABCA-6127 is from the final decision assessing FIC $137,642 for the VA's excess cost of acquiring a replacement electrophysiology instrument from another vendor.

The parties have elected to submit these appeals for decision on the Record pursuant to Rule 11. The Record before the Board consists of the Pleadings; an Appeal File (cited as "R4, tab __") consisting of 42 exhibits; 10 exhibits introduced into evidence by FIC, cited as "Exh. A-__"); 4 exhibits introduced into evidence by the VA, cited as "Exh. G- __"; and, the simultaneous MAIN and REPLY BRIEFS (cited as (FIC or VA) MAIN, or (FIC or VA) RPLY at ___). Both entitlement and quantum are before the Board.

FINDINGS OF FACT

The VA National Acquisition Center in Hines, Illinois (VANAC) issued Solicitation No. M6-Q8-96 (Solicitation) on January 31, 1996 for diagnostic X-Ray systems and related equipment. The Solicitation contemplated a multiple-award, indefinite-delivery/indefinite-quantity (ID/IQ) commercial items contract. VANAC awarded FIC the Contract as one of several vendors awarded contracts for X-Ray systems on September 19, 1996. (R4, tabs 1, 2, 38)

The Contract includes the standard Federal Acquisition Regulation ("FAR"), 48 C.F.R. Chapter 1, prescribed for ID/IQ contracts for commercial items, including the following clauses relevant to these appeals:

> CONTRACT TERMS AND CONDITIONS-COMMERCIAL ITEMS, FAR 52.212-4 (OCT 1995)
> ORDERING, FAR 52.216-18 (OCT 1995)

ORDER LIMITATIONS, FAR 52.216-19(OCT 1995)
INDEFINITE QUANTITY ($100 GUARANTEED MINIMUM), FAR 52.216-22 (OCT 1995)

The relevant part of FAR 52.212-4 is subsection (a) INSPECTION/ACCEPTANCE which states:

> The contractor shall only tender for acceptance those items that conform to the requirements of this contract. The Government reserves the right to inspect or test any supplies or services that have been tendered for acceptance. The Government may require repair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price. The Government must exercise its postacceptance rights (1) within a reasonable time after the defect was discovered or should have been discovered; and (2) before any substantial change occurs in the condition of the item, unless the change is due to the defect in the item.

(R4, tab 38)

In addition to prescribed FAR clauses for commercial item supply contracts, the Contract contains the following relevant terms and conditions:

> COMMERCIAL INTERIM PAYMENT (PART I-CONTINUATION OF SF 1449)
>
> (a) Definition: A commercial interim payment is a payment given the contractor after some work has been done (FAR 32.202-2). For the purposes of this contract, delivery of the equipment shall constitute "some work done".
>
> (b) Upon delivery of the equipment, the contractor is entitled to a single interim payment consisting of 80 percent of the purchase price. To receive the interim payment, the contractor shall submit an invoice in the amount of the equipment purchase price. The invoice shall be submitted in accordance with 52.212-4, Contract Terms and Conditions-Commercial Items, paragraph (g) and the "Remittance Address" instructions provided above.

(c) Verification of the contractor's entitlement to the interim payment shall be accomplished by the medical center providing to the contracting officer a receiving report confirming receipt of the equipment. Upon receipt of the receiving report and the contractor's properly submitted invoice, the contracting officer shall authorize and process the 80 percent interim payment.

(d) The Government shall retain the remaining 20 percent of the purchase price until such time as the installation has been completed and Government has inspected and accepted the installed equipment.

(e) Commercial interim payments are contract financing payments for prompt payment purposes and therefore are not subject to the interest penalty provisions of the Prompt Payment Act (FAR 32.202).

TECHNICAL ACCEPTANCE (PART I-CONTINUATION OF SF 1449)

Prior to acceptance of the goods or services provided under this contract, inspection and testing will be performed by the Government in accordance with II-3, Acceptance Procedures, located in Part II, Contract Terms and Conditions. This inspection will be completed and results furnished within 45 calendar days after receipt of request for inspection as provided under this contract. For purposes of determining the payment due date under this contract, and for no other purpose, the date of acceptance of the goods and services provided under this contract shall be the actual date of acceptance by the Government or the number of days after request for inspection indicated herein, whichever is earlier, provided delay in acceptance is not the fault of the contractor.

DESCRIPTION/SPECIFICATIONS/SCOPE OF WORK
(PART I-CONTINUATION OF SF 1449,
SOLICITATION/CONTRACT/ORDER FOR COMMERCIAL ITEMS)

I-1 SCOPE

This solicitation provides for the normal supply requirements of the Department of Veterans Affairs and other Federal Agencies upon their request for delivery within the 50 states, Washington, D.C., and Puerto Rico. The resultant contracts will be used as mandatory sources for the articles or services listed herein. Articles or services will be ordered from time to time in such quantities as may be needed to fill any requirement determined in accordance with currently applicable procurement and supply procedures. It is anticipated the Other Government Agencies (OGA's) will participate in resultant contracts.

I-2 ITEMS OFFERED

Items offered are to be contractor's standard commercial product line, and as such, MUST conform to specifications defined in the contractor's product and technical data. Also items offered must comply with the acceptance inspections as found in QUALITY ASSURANCE MANUAL FOR RADIOLOGY Attachment 1. *(Emphasis in original.)*

I-13 OPERATIONAL UPTIME

(a) Unit must be operable and available for use 95% of the normal operational time. Operational time is considered 7:00 am-10:00 p.m. Repairs are to made during normal work hours. Downtime will be computed from notification during normal work hours. Scheduled maintenance will be excluded from downtime. (Normal work hours are 8:00 am-5:00 p.m., Monday through Friday, excluding national holidays.)

Failure to meet this requirement for three consecutive months will be grounds for termination for cause under paragraph (m) of clause 52.212-4, "Contract Terms and Conditions – Commercial Items."

(b) Refusal of access to the equipment indicates the unit is up and running and time will not be considered when determining downtime. Refusal of access to the equipment voids the service request.

PART II-CONTRACT TERMS AND CONDITIONS, ADDENDA TO 52.214-4, CONTRACT TERMS AND CONDITIONS – COMMERCIAL ITEMS

II-3 ACCEPTANCE PROCEDURES

(a) Upon completion of installation the equipment will be turned over to the hospital for use. . . . Final acceptance of the equipment and installation will be based upon an inspection and test . . . within thirty (30) calendar days from date of receipt of request for inspection. If equipment passes inspection or if acceptance inspection is not conducted within thirty (30) calendar days from date of receipt of request for inspection, the Government shall accept installation with guarantee date commencing with date of receipt of notification for inspection. Use of the equipment during the period between completion of installation and inspection and/or inspection and reinspection shall not negate the right on the part of the Government to reject the equipment, should it fail, nor to preclude default action against the contractor in the event of failure to correct deficiencies.

(b) In the event the equipment is rejected, contractor will be advised as to deficiencies which were the cause for rejection. It shall be contractor's responsibility to correct reported deficiencies and to advise the Contracting Officer when all corrections have been made and equipment is ready for reinspection. Reinspections will be performed by the Government with all cost incurred chargeable to the contractor's account.

* * * * * * * * * *

> (d) If acceptance has been made and guarantee period established due to the failure of the Government to perform the inspection within the specified time, this does not waive the rights of the Government to perform an inspection (at the Government's expense) nor does it waive the right of the Government to perform reinspections, if deficiencies are noted, with costs incurred chargeable to the contractor's account. Acceptance of the equipment due to the failure of the Government to perform the inspection within the specified time shall not negate the right on the part of the Government to exercise its rights under the Termination for Cause provisions of the contract in the event the contractor fails to correct the reported deficiencies.

(R4, tabs 2, 38)

On September 23, 1996, VANAC awarded Delivery Order No. 797160838 (DO) for FIC's "EP-X Electrophysiology Preferred System" and associated peripheral equipment (EPX) for delivery to VAMC Richmond; the DO price was $376,358. Eight of the ten multi-award contract holders competed to provide an electrophysiology instrument for VAMC Richmond EPX. (R4, tabs 3, 4, 14, 38, 39)

The EPX is a fluoroscopic, digital imaging system to be used for catheterizations, pacemaker implantations and other cardiac procedures. Because it is intended for use as an instrument to show catheters or other devices as they progress through blood vessels in cardiac, the EPX was not designed or equipped to provide the image quality expected of diagnostic, radiographic instruments. In diagnostic systems, higher-powered generators are used, image processors are more sensitive and radiation doses are higher; such diagnostic instruments would generally be three to five times more expensive than the EPX. (R4, tab 38; Exhs. A-2, A-4)

FIC delivered the EPX to VAMC Richmond on December 30, 1997, completed its installation and, by letter dated May 5, 1998, and received by the VA on May 8, requested an acceptance inspection. VAMC Richmond began using the EPX for medical procedures in March 1998. The VANAC Contracting Officer (CO), Steven R. Bense determined that the VA Asset Management Service (SAMS) located in Somerville, NJ would conduct the inspection and, by a standard form letter dated May 12, 1998, requested SAMS' inspection of the EPX by June 5, 1998. SAMS is the proponent of the VA's QUALITY ASSURANCE MANUAL FOR RADIOLOGY, Revision #8, May 1993 (Manual) and is the VA organization charged with general oversight, including acceptance testing, of radiological equipment. The CO, relying on the comments of one of his technical staff who had had conversations with VAMC Richmond, wrote FIC on June 19, 1998 expressing some questions about the EPX installation and its readiness for inspection. FIC did not respond to the letter. (R4, tabs 4, 38, 40; Exh. A-11)

Mr. George Leong of SAMS inspected the EPX on July 1–2, 1998 with FIC representatives in attendance. Based on 16 deficiencies identified by Mr. Leong during the inspection, SAMS recommended rejection of the EPX by memorandum to the CO dated July 11, 1998. On July 14, 1998, the CO provided FIC the list of deficiencies and requested FIC's schedule to correct them and seek reinspection. (R4, tabs 4, 5, 38, 40)

FIC responded to the July 1998 inspection by letter of October 27, 1998 to the CO in which FIC represented that, for the most part, the identified discrepancies had been rectified and suggested that the EPX was Contract compliant and should be accepted. Four of the discrepancies found by SAMS were identified by FIC as being an endemic part of the configuration of its EPX. The first of these four, the longitudinal table top travel of 147 centimeters instead

of the 163 centimeters listed in FIC's product data was identified by FIC as an error on the product data sheet and noted as clinically insignificant since the lesser travel did not affect performance of the EPX. FIC also represented that the 88-degree versus the 90-degree C-arm negative rotation stated in the product data sheets was insignificant in relation to system performance. Moreover, FIC pointed out that 90-degree rotation could be obtained by removal of mechanical and electrical limits installed on the system. FIC also acknowledged that the EPX could not meet the Manual fluoroscopic maximum-minimum/minimum-maximum response time standards but related that this discrepancy did not affect the adequacy of the performance of the EPX in its clinical application. Finally, FIC pointed out that the EPX operator's manual specifically points out that the C-arm collision switches are not recognized when the table is used in a tilt aspect. (R4, tabs 4, 5)

The Manual is a 58-page document consisting of two major parts: "Delivery Order Verification" and "Technical Inspection." The Delivery Order Verification section, consisting of seven pages, provides general instruction on verifying that the item delivered contains all the features listed in the product information and that the machine is functioning and undamaged. In addition, the section directs that the installation of the instrument and the set-up of the room containing the instrument be checked. The "Technical Inspection" section contains detailed technical parameters for an instrument's radiographic, electrical and mechanical performance and detailed procedures to test for those parameters. The Manual makes no distinction between diagnostic radiographic devices and less capable devices such as electrophysiology systems in its requirements. Mr. Leong, a SAMS inspector, performed the first and fourth inspections of the EPX; Mr. Comeyne, also a SAMS inspector, performed the

second and third inspections. Neither Mr. Leong nor Mr. Comeyne had any previous experience inspecting electrophysiology systems such as the EPX but both had previously evaluated diagnostic X-ray systems. (R4, tabs 38, 40, 41)

The CO neither forwarded the FIC October 27 letter to VAMC Richmond nor provided it to SAMS. The VA took no action on the explanations and suggestions provided by FIC. On November 3, 1998, the CO, without FIC's knowledge, requested a reinspection of the EPX. Mr. Comeyne, visited VAMC Richmond on November 25, 1998 and, after deciding that FIC had performed no corrections on the EPX, neither inspected the EPX nor verified any representations made in the FIC October 27, 1998 letter. Mr. Comeyne, without doing any tests or other actions stated in the Manual, essentially reissued the July 2 SAMS report on December 21, 1998, again recommending rejection of the EPX. The CO forwarded the report to FIC on December 22, 1998. (R4, tabs 6, 7, 41; Exh. A-11)

On March 12, 1999, FIC requested a "final" inspection of the EPX, again offering its October 27, 1998 letter, which the VA had yet to answer, in response to the initial inspection in support of its position that the EPX was ready for a "final" inspection and that it was entitled to payment of the remaining 20% of the Contract price. Mr. Comeyne completed his inspection on April 14, 1999 and again recommended rejection, listing 10 discrepancies, most of which had also been listed on the initial, July 1998, inspection report. Mr. Comeyne specifically tested the generator ripple and determined that it was still out of tolerance but did not record the actual test values he found. The CO informed FIC of the April 14 inspection results on April 19, 1999. (R4, tabs 8, 9, 41)

Responding to a notification from VAMC Richmond on June 30, 1999 that FIC was refusing to correct EPX discrepancies or to perform maintenance, Mr. Bense contacted an FIC principal by telephone. That individual verified that FIC service personnel had been instructed to withhold service because of the VA's failure to make payment for several instruments installed by FIC, including the EPX. Mr. Bense informed FIC that he was very close to terminating the DO for default and that FIC needed to take immediate action to resume maintenance and to resolve the VAMC Richmond discrepancies. In his memorandum of this phone conversation, Mr. Bense acknowledged that several of the VAMC Richmond EPX discrepancies could be ignored. A week later, Mr. Bense verified by a phone conversation with VAMC Richmond that FIC had rescinded the "no maintenance" direction. (R4, tab 10)

On August 5, 1999, the CO informed FIC that, after discussions with VAMC Richmond, 11 of FIC's proposed fixes contained in its October 27, 1998 response to the initial inspection were acceptable. VAMC Richmond's position, reflected in a July 28, 1999 memorandum to the CO, on the other five items was as follows:

> Item 7 – Rotation Plate rusting. Unacceptable. If Fischer provides us with a new rotation plate , we will rustproof locally and this will become acceptable.
>
> Item 12 – Fluoroscopic minimum to maximum and maximum to minimum response time. This needs further improvement. It is acceptable once improvement is demonstrated
>
> Item 13 – Fluoroscopic high and low contrast resolution. Unacceptable. Contrast resolution must be improved. Once this is demonstrated, it is acceptable.

> Item 15 – VCR's resolution capabilities not verified due to poor fluoroscopic imaging. Unacceptable. Once improvement is demonstrated for Item #13 and VCR's resolution capabilities are verified, it is acceptable.
>
> Item 16 – Table does not recognize C-arm collision switches during tilt operation in either direction. Patient injury and /or equipment damage is inevitable. Fischer must correct this problem. Once demonstrated, we will consider this acceptable.

(R4, tabs 5, 11)

On October 8, 1999, VA personnel at VAMC Richmond asked Mr. Bogert, a FIC engineer, to attend a meeting concerning the EPX. The CO participated in the meeting by telephone. Concerning CO Bense's participation, Mr. Bogert states in his affidavit:

> Mr. Steve Bense, who was on this conference call, told everyone at the meeting that no matter what happened to the EPX system as a result of Fischer's servicing it, he was going to have the system removed. He was not going to allow Fischer to convince the doctors to keep the equipment. He instructed the people in attendance at that meeting in that conference room to get the documentation together to present a case.

The CO, while not disavowing Mr. Bogert's characterization of his participation at the meeting, alleges that the Bogert statement was "taken out of context" and says his comments at this meeting were made only to assure VAMC personnel that they would not be forced to keep a system not meeting minimum requirements and stressing that the procedures required by the FAR and VAAR would be strictly followed. (Exhs. A-2, G-2)

On October 12, 1999, the head of the VAMC Richmond Electrophysiology Lab, Dr. Gilligan, by memorandum to the VAMC Richmond Chief of Biomedical Engineering, requested removal of the EPX because it was a risk to patient safety, citing poor service and three system breakdowns with patients on the table on September 15, and 20 and October 4, 1999. This Memorandum was forwarded to the CO and concludes with the following statement:

> Overall, the system clearly has never performed as expected and despite many opportunities to fix the system, Fischer has failed to do so. I wish the fluoroscopy system to be removed as soon as possible from the Electrophysiology Laboratory and replaced with a new system.

(R4, tabs 11, 20; Exh. G-3)

Citing the three failed inspections, the CO on October 27, 1999, issued a CURE NOTICE to FIC demanding that it correct the EPX deficiencies within 10 days and insure that the EPX operate 30 continuous days at 95% or better reliability. The CURE NOTICE did not, however, document or allege that the EPX had not met the operational reliability standards. The CURE NOTICE also threatened to terminate the DO for cause should FIC not comply with the VA's demands. In addition, the CO "further substantiated" the CURE NOTICE by citing the evidence of repeated breakdowns of the EPX from Dr. Gilligan's October 12, 1999 Memorandum, poor fluoroscopy quality, rusting of the EPX C-arm and bases and poor service by FIC. (R4, tab 12)

FIC responded to the CURE NOTICE on November 4, 1999 by requesting that the system be made available to them for a three day period to evaluate all items on the discrepancy list and that they be afforded until November 30, 1999 to rectify the problems noted in the CURE NOTICE. The CO and FIC, in a

November 9, 1999 telephonic meeting, agreed that: 1) FIC would be given access to the EPX for three days, November 11-14, 1999; 2) The EPX would be available for VAMC Richmond to perform procedures on November 15, 1999: and, 3) SAMS would conduct an inspection for compliance with the Manual on November 19, 1999. (R4, tabs 13, 14)

FIC was given access to the EPX for four days in mid-November and performed numerous maintenance and improvement tasks. Mr. Romolo Conversano, a FIC design engineer, led FIC's effort. His intent was to satisfy the concerns of Dr. Gilligan, the Director of Cardiac Electrophysiology Laboratory at VAMC Richmond concerning the quality of the EPX performance and its reliability so that the EPX could pass a final inspection and enable FIC's recipt of 20% of the EPX purchase price still being withheld by the VA. Mr. Conversano addressed 10 issues concerning the EPX in November 1999. All of these issues had been noted as deficiencies in the previous SAMS inspection reports. (R4, tabs 4, 5, 7-9, 11, 41; Exhs. A-2, A-4)

The first issue addressed by Mr. Conversano was the crushed cable protector hoses at the table base. This problem was rectified by replacement of the existing hoses. The next issue addressed by Mr. Conversano was the rusting of the table base and rotation plate. FIC cleaned and repainted the table base and replaced the rotation plate. However, the new rotation plate, taken from FIC parts stock, also showed signs of rusting when installed. Mr. Conversano identified this as a manufacturing problem and recommended to his superiors that the rotation plate be redesigned. The rusting of the rotation plate did not affect performance of the EPX. (R4, tab 35; Exhs. A-1, A-4, A-5)

Mr. Conversano next addressed the longitudinal table travel issue. He verified that the travel was 147.3 centimeters not the 163 centimeters stated in

FIC's product literature. The shorter longitudinal travel was never identified as a problem by the medical staff, probably because, in normal use, the EPX primarily focused on the body from the neck to the pelvis, not the whole body, which obviated the need for the additional 12.6 centimeters. The 163 centimeter travel was an erroneous representation in the product literature.
(R4, tab 5; Exhs. A-2, A-4, A-5)

The failure of the EPX to meet the fluoroscopic 1.5 second minimum to maximum and 1.8 second maximum to minimum response time standard in the Manual could not be rectified by FIC; the EPX was simply not designed to, nor capable of, meeting the response times. FIC had never measured or represented the response time. No customer, other than the VA, had ever inquired about or made an issue out of the response time. The response time standard in the Manual is contained in the "Fluoroscopic Automatic Brightness Control Response" section. Mr. Leong asserted that the response time testing protocols are adapted from American Association of Physicists in Medicine (AAPM) standards and that the VA considers the response time as an indicator of image quality. The Manual, however, does not indicate that it is an adaptation of AAPM standards nor is there any indication of what the AAPM standards were. (R4, tab 38; Exhs. A-1, A-4, A-5, G-1)

The EPX response times were around six seconds each way; Mr. Conversano was able to reduce these times to approximately 3.6 seconds in each direction by making several improvements to the EPX hardware and software. For the EPX to meet the Manual's response time standards would require substantial modifications to the EPX and its operating software and would essentially be a redesign/rebuild of the EPX. (R4, tabs 23, 40; Exhs. A-1, A-4, A-5)

Mr. Leong maintained that the longer response times could result in a patient receiving additional exposure to radiation. Mr. Conversano adamantly refutes that assertion in substantial technical detail. The VA offers no technical information to support Mr. Leong's assertion of additional radiation exposure. In normal clinical application, there would be almost no circumstance where the system would be called upon to go from maximum to minimum or minimum to maximum power; the normal operation would be a small power range above or below a default power-up setting. (R4, tab 40; Exhs. A-1, A-4, G-1)

The fifth issue addressed by Mr. Conversano was that of the EPX high and low contrast resolution. Assessing that, based on discussions with VAMC Richmond medical personnel, image quality was the primary objection to the EPX, Mr. Conversano performed extensive testing, recalibration and other work to rectify the fluoroscopic high and low contrast resolution problems and improve the fluoroscopic image. VAMC Richmond medical personnel indicated that they were expecting visual resolution on the EPX to be similar to that achieved on the hospital's cardiac catheterization system. Mr. Conversano's efforts resulted in the SAMS inspector, Mr. Leong, and the VAMC Richmond medical staff agreeing that the image quality was acceptable.
(R4, tab 40; Exhs. A-1, A-4, A-5)

The VCR incorporated into the EPX had never been hooked-up and apparently was never needed by VAMC Richmond medical personnel. SAMS identified as a deficiency the fact that the VCR resolution performance could not be measured due to the fact that there was no cable connection. All that was needed for the connection was to attach a cable; VA personnel represented that this item was not a concern since Mr. Conversano had brought the EPX image to acceptable standards. (Exhs. A-4, A-5)

Mr. Conversano addressed the next discrepancy item, a rusting bearing on the C-Arm bearing by replacing the bearing and applying grease. (Exhs. A-4, A-5)

Mr. Conversano had no opportunity to address the ripple issue because the SAMS inspector determined that there was no point in testing for ripple because of the EPX's response time failures. SAMS first asserted that the EPX ripple performance deviated from VA tolerances in the third inspection conducted in April 1999. However, neither the test protocols used by the inspector to test ripple performance, nor the results of the ripple tests were ever documented by the VA or provided to FIC. Ripple performance of the EPX has no relation to the System's response time performance. Ripple measurement and tolerances in the Manual are contained in the section dealing with the calibration of the EPX generator. (R4, tab 38, Exhs. A-1, A-4, A-5)

Mr. Conversano rectified the C-arm collision switch problems, which had been identified by the VA as a discrepancy so that collision notification on the EPX worked in the manner desired by the VA. (Exh. A-1, A-4, A-5)

The final VA listed discrepancy, Polaroid Freeze Frame Video Imager, arose at the first inspection. As FIC informed the VA on October 27, the Polaroid unit was discontinued between the order date and delivery; FIC provided an equivalent Sony unit. The Richmond VAMC indicated to the CO that the Sony unit was acceptable. There is nothing in the record to indicate that the Sony unit was not the equivalent of the Polaroid unit or was otherwise unacceptable to the VA. (R4, tab 5, Exhs. A-1, A-4, A-5, A-11)

Mr. Conversano also identified and resolved several additional problems not previously identified. One such problem was with the EPX Monitors, which exhibited gray scale burnout occurring over the time the VA had used the EPX.

This "burnout" resulted in a scale being permanently imprinted on the screen and derogated the visible image while the monitors were in use. Mr. Conversano recalibrated the monitors to improve the image and FIC later offered to replace the monitors with better quality monitors at no charge. (R4, tab 23; Exh. A-1, A-4)

Mr. Conversano replaced circuit boards to resolve problems with random motions being experienced from the EPX remote controls and incorrect C-Arm motions, additional problems identified by FIC in its mid-November 1999 efforts. Also, Mr. Conversano replaced circuit boards in the power supply system and generator that were the source of the September and October breakdowns eliminating the problems listed in Dr. Gilligan's Memorandum of October 12, 1999. (Exhs. A-1, A-4, A-5)

Mr. Leong reinspected the EPX on November 19, 1999 and again recommended rejection of the EPX. Mr. Leong cited the rusting C-arm, rotation base plate, the missing Polaroid imager, the longitudinal table travel, the KVP response time, generator ripple, the inability to test VCR resolution capabilities and the monitors as the reasons for the recommended rejection. Although the SAMS inspection report cited 7 reasons for the rejection, the primary reasons for rejection were the failure of the system to meet fluoroscopic KVP response times, the failure to meet KVP ripple specifications and the inability to test the resolution capabilities of the VCR. Mr. Leong did not actually test the response time or the ripple in the November 19 inspection; his inspection report to the CO, dated November 22, 1999, a Monday. There is no evidence in the record that Mr. Bense received the report prior to terminating the DO for cause on Wednesday, November 24. (R4, tabs 15-17, 40; Exhs. G-4, A-9)

On November 15, 1999, the CO faxed seven vendors soliciting firm quotes for a replacement EPX for VAMC Richmond based on the original FIC detailed quote. The prospective vendors were instructed to provide their quotes to the CO by November 19, 1999. In a MEMO TO RECORD dated December 12, 1999, the CO related that he contacted VAMC Richmond with the results of the quotes and established that VAMC Richmond "…had already established the same information..." The CO also relayed that VAMC Richmond had selected the replacement EPX it wished to acquire. (R4, tabs 28, 29, 30)

Mr. Bense, received an e-mail from his liaison at VAMC Richmond on November 16, 1999 detailing some of FIC's efforts to correct the EPX discrepancies. This e-mail concluded with the following statement:

> In all one must give credit to Fischer for their engineering of fixes in the field and applying the necessary resources to correct problems that have been ongoing for almost a year.

Mr. Bense, on November 17, 1999 sent a letter to FIC essentially repeating the text of the e-mail without the statement quoted above but asking FIC to verify the completion of the work to resolve the C-arm collision problem. FIC did not receive this letter prior to the termination and did not respond. (R4, tabs 15, 16)

The CO terminated the DO for cause on November 24, 1999 citing FIC's "failure to provide an ordered system meeting the terms and conditions of the contract" as the reason for the termination. The termination letter included a unilateral modification of the DO effecting the termination of the DO for cause and directing FIC to "deinstall" the EPX at VAMC Richmond. The termination letter also characterized the termination as a CO final decision for which FIC could seek redress under Contract DISPUTES provisions. In addition, the CO issued a "Bill For Collection" demanding return of $302,086 (80% of the DO purchase price) the VA had paid to FIC. (R4, tab 19)

A "Finding and Determination" executed by the CO, also dated November 24, 1999, and following the guidelines in FAR 49.402-3(f) cites: 1) The applicability of the Manual as a Contract term; 2) The inexcusable 4 EPX inspection failures, finding that the reason for each failure remained essentially the same, which, in turn, evidenced FIC's failure or refusal to take any action to correct the discrepancies; 3) FIC's "disregard for correct contract administration procedures" as evidenced by FIC's June 1999 withholding of maintenance in an attempt to force payment for the EPX and other systems delivered by FIC under the Contract; 4) FIC's alleged position evidenced by a paraphrased quote that the VA was aware of what it was purchasing when it ordered the EPX and that the VA expectations for the performance of the EPX were unreasonable; and, 5) The EPX was a "risk to patient safety" based on three cited incidents as the bases for the termination for cause. In addition, Mr. Bense cited FIC's failure to respond to compromise proposals that would have permitted VAMC Richmond's acceptance of the system in July 1999. Mr. Bense could not actually identify when or who from FIC uttered the quote he paraphrased in the Finding and Determination used to support his conclusion that FIC believed the VA should accept the EPX because the VA knew it was purchasing a less expensive, less capable device. (R4, tabs 11, 18)

The "Contracting Officer's Statement" summarizing this appeal, concludes that each of the seven discrepancies noted in the final, November 1999 inspection report recommending rejection, would individually support rejection of the EPX and the termination for cause. (R4, tab 1)

By memorandum dated December 15, 1999, the CO directed VAMC Richmond to cease using the EPX, reminding VAMC Richmond that the DO had

been terminated for cause and that he had directed FIC to remove the EPX by December 20. Between February 4 and February 11, 2000, FIC disconnected and removed the EPX from VAMC Richmond. (R4, tabs 20, 21, 37)

By letter dated December 21, 1999 and received by the VA on December 27, FIC, through its counsel, disputed the termination and requested the CO's reconsideration of the termination for cause. FIC offered, at no additional cost to the VA, to make significant improvements to the EPX, including improving the KVP fluoroscopic response time to two seconds each way. In a January 4, 2000 letter, the CO rejected FIC's proposal because of VAMC Richmond's conclusion that the FIC proposed improvements were unacceptable and because VAMC Richmond had no confidence in FIC's ability to perform. In his letter rejecting the FIC proposal, the CO reiterated his November 14, termination decision. (R4, tabs 23, 24, 25)

VAMC Richmond performed 584 procedures utilizing the EPX between March 17, 1998 and December 14, 1999. Thirty-two procedures were performed in the period between November 24 and December 15, 1999 and 73 procedures using the EPX were performed in the period between the date of Dr. Gilligan's memorandum declaring the EPX a danger to patient safety and the CO's December 15, 1999 direction that the EPX not be used because the DO had been terminated for cause. (R4, tabs 39, 42)

Between April 1998 and October 1999, prior to FIC's intensive efforts to respond to the Cure Notice, FIC made approximately thirty maintenance and trouble calls on the EPX. This number does not include the days FIC maintenance personnel attended the various inspections of the system and is based on the FIC service records in the Appeal File. Although "repeated

breakdowns of various components" were mentioned by the CO in the October 27, 1999 Cure Notice, the VA has neither alleged nor provided any evidence to show that the EPX failed to meet the 95% uptime requirements of the Contract OPERATIONAL UPTIME clause. (R4, tabs 12, 37, 38)

The CO issued a BILL FOR COLLECTION on December 9, 1999 to FIC for $136,642, the amount of the price of the electrophysiology device to replace the EPX at VAMC Richmond in excess of the $376,358 EPX price. This amount was based on Trex Medical Corporation's (Trex) $513,000 quote for its EP 2000 Digital Spot instrument. Trex also offered a less capable system, the EP 2000 Basic System, for $429,000. The Trex quotes were the lowest submitted by the seven vendors solicited. The CO assessed the Trex Digital Spot system as being closest to the EPX specifications and capabilities. Mr. Bense acknowledged that the Digital Spot System was more capable than the EPX but attributed the price difference to normal technological progress over the three years since the EPX was offered and inflation in the price of radiological equipment. Mr. Conversano points out 14 significant components of the system making the Digital Spot System a more capable (and more expensive) system. He finds similar technological differences in the EP 2000 Basic System. All in all, Mr. Conversano characterizes the Trex systems by stating:

> Overall, both quotes from Trex, specifically the components I've listed above, are not similar to Fischer's system and in fact are more indicative of a full-blown cardiac system versus a small low-budget EPX lab, which is what the Fischer system was.

(R4, tabs 28-32; Exh. A-1)

DISCUSSION

The VA asserts that its termination of the Delivery Order issued FIC for cause was fully justified because FIC failed to deliver an electrophysiology system meeting the specification requirements of the Contract. This failure, according to the VA, was inability of the EPX to meet Manual requirements.

FIC maintains that the VA accepted the EPX under the Contract terms or by operation of law and relinquished its rights to terminate the DO for cause by such acceptance. FIC also argues that the EPX was suitable for use and that the VA was precluded from terminating the DO for cause for its technical non-compliance with the Manual by the doctrine of economic waste. Finally, FIC maintains that CO abused his discretion in terminating the DO for cause because he did not comply with FAR requirements.

The VA's termination of the DO for cause, equivalent to the termination for default of a contract, is a drastic action to be taken only for good cause and only if justified by the Government by the preponderance of evidence. ***J.D. Hedin Construction Co. v. United States***, 408 F.2d. 759 (Ct. Cl. 1969); ***Lisbon Contractors v. United States***, 828 F.2d. 759 (Fed. Cir. 1987). FIC maintains that, because the initial inspection of the EPX was not performed until 53 days after the VA's receipt of the inspection request, the VA accepted the EPX under the terms of the Contract, an acceptance that negated the VA's right to terminate the DO for cause. The Contract acceptance terms are delineated in FAR 52.212-4(a), INSPECTION AND ACCEPTANCE and the addenda to FAR 52.212-4 found at Section II-3, ACCEPTANCE PROCEDURES of the Contract.

These Contract terms, to some extent, seem confusing and contradictory. The standard acceptance provisions for a commercial items contract reflected in FAR 52.212-4(a) are general in nature and reflect the proposition that, in making

an acquisition under FAR commercial item provisions, the Government has determined that an off-the–shelf commercial product meets the needs of the Government. The clause at FAR 52.212-4(a), by focusing on the Government's responsibilities with regard to post-acceptance rights, reflects the policy expressed in the FAR that the Government should rely on contractor's quality assurance programs as is customary in the commercial market.

The additional, VA tailored, ACCEPTANCE PROCEDURES are included as "addenda" to the provisions of FAR 52.212-4(a). It is these terms, at Section II-3 of the Contract that can be seen as both internally contradictory and contradictive of the prescribed FAR provision. Paragraph (a) of the ACCEPTANCE PROCEDURES provides for a VA inspection and test of the EPX. It also provides for a "deemed acceptance" of the EPX by the VA should the VA not inspect within 30 calendar days of FIC's request for inspection. However, Paragraph (d) of the ACCEPTANCE PROCEDURES seems to make this "deemed acceptance" illusory by providing for the VA's retention of its right to inspect (and impliedly reject) the EPX and to retain its rights to terminate for cause should the EPX be found deficient and not pass the inspection.

The VA asserts that it never accepted the EPX notwithstanding the fact that it did not inspect until 53 days after it received FIC's request for inspection. Thus, the VA is taking the position that a "deemed acceptance" as outlined in the Contract terms has no legal consequences. We note the VA's assertion, citing the CO's letter in early-June 1998 to FIC pointing out certain problems with the EPX, that it should not be charged with failing to inspect within the 30-day window. According to the CO, he sent this letter based on his hearing that VAMC Richmond had some questions about the EPX installation. The CO's early-June 1998 letter is insufficient to prove that the EPX was not ready for inspection or

that FIC, who never responded to the CO's letter, requested that the inspection be delayed. The evidence shows that FIC requested an inspection on May 5, 1998 and the VA did not perform the requested inspection until July 1 and 2, 1998.

Of course, the VA maintains that its failure to inspect within the 30-day window provided in the Contract is of no consequence with regard to whether it accepted the EPX. To adopt the VA's position would require us to read the "deemed acceptance" provisions of the ACCEPTANCE PROCEDURES out of the Contract. This, of course, is contrary to the accepted rules of contract interpretation, which require that we try to reconcile the clear language of the Contract in order to impart meaning to all its terms. ***Hercules, Inc. v. United States***, 292 F.3rd 1378 (Fed. Cir. 2002); ***Brant Construction Management, Inc.***, VABCA No. 5391, 98-2 BCA ¶ 30,073.

As addenda to FAR 52.212-4(a), the ACCEPTANCE PROCEDURES must be read in conjunction with the FAR clause and reconciled with those provisions. The FAR and VA acceptance terms can be reconciled by reading Paragraph (d) of the ACCEPTANCE PROCEDURES as an implementation of the FAR 52.212-4(a) instructions concerning post-acceptance rights. This interpretation recognizes the clear meaning of Paragraph (a) of the ACCEPTANCE PROCEDURES providing for "deemed acceptance" and delimits, in Paragraph (d), the VA's rights to inspect after acceptance; the beginning of any warranty period; the right to require correction of deficiencies; or, revoke acceptance as part of its post-acceptance rights. We note also that this interpretation is consistent with the Contract payment provisions, which provide for an 80% interim payment of the Contract price after delivery and payment of the remaining 20% after acceptance. The TECHNICAL ACCEPTANCE provision set forth as a continuation of the SF 1449

Contract document, provides for payment of the 20% remainder after a "deemed acceptance". There is a further inconsistency in the Contract terms in that the TECHNICAL ACCEPTANCE provision sets the deemed acceptance window at 45 days from the date of the request for inspection by the contractor for the purposes of establishing when the 20% remainder payment is due. This 45-day period, however, is limited by the express language of the TECHNICAL ACCEPTANCE provisions to determining the due date for payment of the 20% remainder of the Contract price. Thus, the VA's failure to inspect within 30 days of the request for inspection is an "acceptance" of the EPX under the terms of the Contract.

Since the VA accepted the EPX, we must view the termination for cause in light of the Contract terms relating to the VA's post-acceptance rights. The Contract in the clause at 52.212-4(a), in the factual situation here, provides for the VA to exercise its post-acceptance rights "within a reasonable time" after any alleged deficiency in the EPX was discovered. Here our task is to determine whether, in the absence of a Contract definition of "reasonable", the VA's revocation of acceptance by the termination for cause in November 1999 was exercised within a reasonable time after it discovered that the EPX did not meet the standards set forth in the Manual. In approaching that task, it is appropriate for us to look to the Uniform Commercial Code (UCC). We have turned to the UCC and precedent interpreting the UCC in similar circumstances and our controlling Circuit has recognized the applicability of the UCC to interpreting public contracts. It is particularly apt to do so here since we are dealing with a commercial items contract where the Government intentionally places itself in the commercial market place and because the applicable Contract provision

(FAR 52.212-4(a)) closely tracks the language of UCC § 2-608 (2). ***Franklin Pavkov Construction, Co. Inc.*** 279 F.3rd 989 (Fed. Cir. 2002); ***John C. Kohler Co. v. United States, 489*** F.2d 1360, (Ct. Cl. 1974); ***Trio-Tech, Incorporated***, VABCA No. 598, 68-1 BCA ¶ 6,828; ***Mazur Bros. & Jaffe Fish Co., Inc.***, VABCA No. 512, 65-2 BCA ¶ 4,932; ***ABM/Ansley Business Materials***, GSBCA No. 9367, 93-1 BCA ¶ 25,246.

The CO had knowledge that the EPX did not meet standards set forth in the Manual with receipt of the SAMS inspection report on July 11, 1998. At the latest, the VA was aware that the EPX could not meet all of the Manual standards, in particular the response time standard, by late-October 1998. Despite this knowledge, which was reinforced by subsequent inspections and communications between the parties, the VA continued to use the EPX for hundreds of procedures for over one year. UCC § 2-608 states, in relevant part:

> (1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it
>
> > (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured . . . .
>
> * * * * * * * * * * * *
>
> (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

The facts here speak for themselves. The VA could revoke its acceptance of the EPX if the non-conformity "substantially" impaired the value of the EPX to the VA, if the VA reasonably expected that FIC would cure the non-conformity and if the non-conformity was not cured. The evidence here shows that the VA either waived or accepted all of the alleged non-conformities of the EPX save for the "ripple" problems and the "fluoroscopic response time" problems. The alleged deviation of the EPX generator from Manual "ripple" standards cannot be sustained because, in the final inspection that putatively provides the basis for the termination for cause, the VA did not even test for ripple deviation.

Additionally, the VA provides no convincing evidence that the response time standard in the Manual was appropriate or meaningful for a non-diagnostic instrument like the EPX and that either the response time deviation or the supposed generator ripple discrepancy impaired the operation of the EPX. Based on the evidence here, we agree with FIC's conclusion that neither the supposed response time nor generator ripple discrepancies had any clinical significance; a conclusion validated by the VA's lengthy, continued successful use of the EPX. Finally, FIC made it clear to the VA early on that the EPX could not meet the fluoroscopic response time standard and the VA had no reasonable basis to expect that the response time deficiency would be cured.

Even if the alleged deficiencies could be shown to have reduced the value of the EPX, the VA's attempted revocation of acceptance (the termination of the DO for cause being the buyer notification required under UCC § 2-608) more than 12 months after it became aware that the EPX would not conform to all the

Manual standards was clearly not made "within a reasonable time" after the VA became aware of the alleged deficiencies. Consequently, the VA's attempted revocation of its acceptance of the EPX is invalid. ***Ted Sobiech, d/b/a/ Ted Sobiech Farms v. International Staple and Machine Co., Inc., 867*** F.2d 778 (2nd Cir. 1989); ***Computerized Radiological Services v. Syntex Corporation,*** 786 F.2d 72 (2nd Cir. 1986); ***Electro Optics, Inc.***, ASBCA No. 22,017, 78-1 BCA ¶12,996.

We note that even had there been no "deemed acceptance" of the EPX pursuant to the Contract terms, the VA, by its continuous use of the EPX from March 1998 to December 1999 to successfully perform 584 cardiac procedures, constructively accepted the EPX and the attempted revocation of such acceptance was not timely made. UCC § 2-606 (1) states:

> (1) Acceptance of goods occurs when the buyer does any act inconsistent with the seller's ownership; but if such act is wrongful as against the seller it is an acceptance only if ratified by him.

The evidence in the record demonstrates that FIC believed the VA had accepted the EPX. FIC "ratified" the VA's constructive acceptance by recognizing its obligation to maintain and perform warranty work on the VA's property and by expressing its expectation of receiving the VA's payment of the full price for the EPX. On its part, the VA clearly exhibited ownership and control over the EPX by its extensive use of the EPX, including performing 73 procedures after it terminated the DO for cause. We can reach no other conclusion than that these facts support that the VA constructively accepted the EPX. ***International Staple and Machine Co., Inc.,*** 867 F.2d 778; ***Syntex Corporation,*** 786 F.2d 72; ***John C. Kohler Co.***, 489 F.2d 1360;, ***Mazur Bros. & Jaffe Fish Co***, 65-2 BCA ¶ 4932; ***Ateron Corporation***, ASBCA No. 46,867, 96-1 BCA ¶ 28,165

While the foregoing is dispositive of these appeals, it is appropriate to briefly consider the argument upon which the Government has placed stress in its brief. That is, the VA asserts that it is entitled to receive exactly what it specified in the Contract and that the EPX failed to meet that specification. This argument is based on the VA's conclusion that the EPX failed to meet requirements specified in the Manual. These Manual requirements were included as a part of a clause, which was a continuation of SF 1449, Block 20, SCHEDULE OF SUPPLIES/SERVICES. This continuation provision included terms that FIC offer its "standard commercial product line", that the items it offered conform to the FIC's product and technical data and that any items it offered conform to Manual acceptance inspections. As noted previously, the Manual sets forth detailed electrical, radiological and mechanical performance criteria that, according to the VA, placed the responsibility on FIC to insure that its standard product line meet all of the Manual performance specifications. As a consequence the VA believes it is entitled to demand the EPX meet these specifications regardless of whether EPX conforms to the FIC product data submitted and regardless of whether non-compliance with a particular Manual standard was related to the EPX's clinical performance.

The question presents itself as to whether the VA's inclusion of a detailed, technical performance specification in a commercial items contract conforms to FAR policy. Reviewing FAR Part 12, ACQUISITION OF COMMERCIAL ITEMS, reveals that, in deciding to use the advantages of the commercial marketplace and commercial item acquisition, the VA is required to consciously survey the market to determine if commercial, off-the-shelf products can meet its needs. Such a survey is to include a vendor's product and technical data so that the VA can make a determination, based on that data, that the product meets its technical

requirements. When we reference the FAR in this discussion, we are referencing the FAR provisions in effect at the time the Contract was entered into (48 CFR Parts 12 and 52, 10-1-97 Edition).

In soliciting for the acquisition of commercial items, the VA is directed, as a matter of policy, to rely on a contractor's assurances that its products conform to the contract requirements. The clear implication in the FAR is that the VA, by choosing to acquire an item by using commercial items acquisition procedures forgoes the option to include detailed design or performance specifications and, instead, is to rely on the marketplace to meet its needs.

We recognize that FAR Part 12 allows tailoring the FAR specified commercial items provisions when the CO determines such tailoring is necessary to meet the Government's needs or to protect its interests. Here, there is nothing in the record documenting such a determination. Moreover, we are puzzled by the fact that the Manual specifications were incorporated as part of Block 20 of the SF 1449 but were not identified in the addendum to the Contract acceptance terms in FAR 52.212-4. This has the appearance of specification by stealth where the VA incorporates very detailed and technical performance requirements as part of a purchase description while maintaining the illusion that it was conducting a normal off-the-shelf commercial item acquisition. This method of incorporating performance specifications does not appear to be consistent with commercial practice. Where, in a commercial item acquisition, the Government imposes provisions inconsistent with commercial practice, FAR 12.302 requires it to obtain a waiver to impose such a condition. There is no evidence in the record that such a waiver was obtained or even considered in this acquisition.

Based on the discussion above, it is also unnecessary for us examine Appellant's assertions that the VA's termination for cause was precluded by the doctrine of economic waste and that the CO abused his discretion in the decision to terminate. Nevertheless, we are troubled by Mr. Bense's purported rationale for his decision. The evidence in the record flatly contradicts the CO's recitation that any one of the seven discrepancies cited by SAMS for its recommended rejection would support the termination. The citation that the EPX was a risk to patient safety is also unsupported in the record and would require us to conclude that VAMC Richmond knowingly risked its patients by continuing use of the EPX after the November letter to the CO citing the "risk to patient safety" assessment. Since the termination of the DO for cause was improper because of the VA's untimely revocation of its acceptance, by operation of the Contract clause at FAR 52.212-4 (m), the termination for cause is converted to a termination for the Government's convenience within terms of the clause at FAR 52.212-4 (l).

DECISION

For the forgoing reasons, the Appeals of Fischer Imaging Corporation Company, VABCA-6125, 6126 and 6127, under Contract No. V797P-6712A, Delivery Order No. 797160838, are **SUSTAINED.** The termination of Delivery Order No. 797160838 for cause is converted to a termination for the Government's convenience. The claims by the VA for repayment of $301,086, the amount of the purchase price paid (VABCA-6126) and for $136,642, the excess reprocurement costs (VABCA 6127) are hereby **DISMISSED.**

DATE: **September 10, 2002**

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RICHARD W. KREMPASKY
Administrative Judge
Panel Chairman

We Concur:

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GUY H. MCMICHAEL III
Chief Administrative Judge

_____
JAMES K. ROBINSON
Administrative Judge